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JOHN T. FEY, Cle

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956.

No. 882.

ENTERPRISE INDUSTRIES, INC.,
Petitioner,

v.

THE TEXAS COMPANY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF IN OPPOSITION OF RESPONDENT THE TEXAS COMPANY.

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BRIEF IN OPPOSITION OF RESPONDENT THE TEXAS COMPANY.

Opinion Below.

The opinion of the Court of Appeals is reported at 240 F. 2d 457. It is also printed as an Appendix of the Petition. The opinion of the District Court is reported at 136 F. Supp. 420.

Jurisdiction.

Petitioner invokes this Court's jurisdiction under 28 U. S. C. §1254 (1).

The judgment of the Court of Appeals was entered on January 7, 1957. A Petition for Rehearing was denied on January 23, 1957.

Questions Presented.

The questions presented by the petition are not properly framed. First, they presuppose resolution of two critical issues in favor of petitioner which the Court of Appeals expressly left open, namely: (1) whether respondent committed a price discrimination having an anti-competitive effect within the meaning and in violation of Section 2 (a) of the Robinson-Patman Act[1] and (2) whether respondent's pricing policy was in any event sanctioned by the meeting competition defense embodied in Section 2 (b) of the statute. Only if both of these preliminary issues are resolved against respondent does it become material to consider the appropriate measure of damages in the factual context of this litigation. And even if the issue of damages were reached, the question would not be as posed by petitioner. Rather, it would be as follows: In a private treble damage action based upon an alleged violation of the price discrimination provisions of the Robinson-Patman Act, is the plaintiff automatically entitled to damages measured by the price differences, thereby dispensing with the necessity of proving actual loss to his business as a proximate result of the discrimination?

Statement of the Case.

(1) The Questions Below.

Following an adverse decision by the District Court, sitting as trier of the facts without a jury, respondent appealed to the Court of Appeals on three separate and distinct grounds.

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[1] Throughout this brief Section 2 of the Clayton Act, as amended by the Robinson-Patman Act, is referred to as Section 2 of the Robinson-Patman Act.

First of all, it urged that there had been a total failure of proof of any violation of the Robinson-Patman Act by respondent since no evidence had been presented that competition existed between petitioner and any other Texaco dealer who received a lower price. The contrary finding by the District Court was attacked as clearly erroneous.

Next, respondent argued that its method of pricing during the retail gasoline price wars in controversy was sheltered by the meeting competition defense of Section 2(b) of the Robinson-Patman Act. The District Court had rejected this defense as a matter of law on the theory that the statute does not sanction the meeting of competition in good faith at the buyer level. This interpretation was challenged as an improper constriction of the statutory defense.

Finally, respondent maintained that there had been no showing that petitioner had suffered any injury to its business as a proximate result of respondent's pricing policy and that the District Court had erred in adopting a rule of automatic damages based on mere price differences to support a recovery.

Since the Court of Appeals agreed that there had been no proof of damages, it found it unnecessary to pass upon the validity of respondent's first two arguments. It is self-evident, however, that petitioner cannot recover in this action unless it prevails on each and every one of the three questions set forth above.

To see those questions in their proper perspective, a brief recital of the salient facts is in order.

(2) Statement of Facts.

This suit was the outgrowth of a method of pricing which respondent used to lighten the financial burdens of Texaco dealers who from time to time found themselves in the

throes of retail gasoline price wars in the Hartford area. These dealers were given a reduction from the normal wholesale price sufficient to enable them to meet the competition of service stations selling competing brands of gasoline in their vicinity and still retain an adequate margin of profit. Petitioner, a Texaco dealer, at first requested and received such price allowances. Later, it chose not to meet competition and to do without any allowance. To understand petitioner's motivation, it is essential to have a clear picture of the strategic location of the Enterprise service station.

This station was situated on the southbound side of the Berlin Turnpike several miles below Hartford (Fdg. 1, A. 376; Fdg. 10, A. 377). This highway is a segment of the principal motor route between Boston and New York (Fdg. 10, A. 377).

For travelers proceeding southbound from Boston on the Wilbur Cross Highway, Enterprise was the *first* gasoline station for a stretch of 40 miles from the Massachusetts border (Fdgs. 11 and 26, A. 377, 380; A. 78, 373-74). Within a quarter of a mile south of Enterprise, however, there were five gas stations (A. 92, 304-05). Immediately next door was a Gulf dealer, followed in close order by Amoco, Sunoco, Esso and Socony outlets (A. 304-05, DX 12, A. 339). An Atlantic and another Sunoco station were directly opposite (A. 304-05, DX 12, A. 341). All seven of these stations were in direct and immediate competition with Enterprise (DX 12, A. 341; Fdg. 12, A. 378).

Petitioner's claim of a Robinson-Patman violation was based on respondent's prices to 15 other Texaco dealers situated within the congested metropolitan area of Hartford and in adjoining towns (A. 349-50). All were a considerable distance from petitioner's station, many of them across the whole width of the city (DX 4, A. 333; A. 41-43).

None was located on the Berlin Turnpike. All catered to a neighborhood trade (A. 71-73, 118; see Fdg. 25, A. 379).

The transient through traffic accounted for about 80% to 90% of Enterprise's total sales (A. 39, 53, 69, 107-11, 120, 165). The trial court found that this trade was "non-competitive with the other Texas stations" (A. 373).

It has been respondent's position throughout this litigation that the other Texas stations were not in competition with Enterprise. The District Court found that 9 of the 15 stations were in competition with petitioner and that 6 were not. However, it did not predicate this differentiation or conclusion on any evidentiary basis discernible in the record. It was this finding which respondent attacked as clearly erroneous in the Court of Appeals—a point which that court pretermitted.

The gasoline price wars which concern us usually began in the East Hartford area. At the outset they were often confined to a few stations in a limited locality, but eventually they spread throughout greater Hartford (Fdg. 9, A. 377; A. 154-55, 167-68, 276-77). The wars were started by stations selling competing gasoline—never by a Texaco dealer (Fdg. 8, A. 377).

Normally, the dealer's gross margin—the difference between what he pays for gasoline and what he sells it for —ran about 5¼¢ and 5¾¢ per gallon (A. 95; PX A, C, D, A. 385, 327, 329). During the wars, however, retail prices were frequently as low as, or even below, the wholesale price at which respondent sold gasoline to its dealers.

Where such sharply reduced or non-existent margin prevailed, Texaco dealers in the competitive area were threatened with extinction (A. 85, 140, 148). To cope with this critical problem, respondent put into operation a dealer assistance program (A. 84-86).

Under this program, a dealer plagued by a price war in his neighborhood could request assistance from the company (A. 85, 143, 175-79, 183). If competing prices were so low as to require the Texaco dealer, in order to meet competition, to sell at a margin of less than 3½¢ per gallon, the request would be granted (Fdg. 15, A. 378; A. 86-87, 94-96, 103, 180, 183).

The assistance took the form of a reduction in the wholesale price to the dealer by such an amount as to assure him a gross margin of 3½¢ per gallon in meeting the competition of other brands of gasoline sold by competing stations in his area (*Ibid.*).

Because the competing retail prices which the Texaco stations had to meet varied neighborhood by neighborhood, the net wholesale price to them—computed by subtracting the gross margin allowance under the program from the variable retail price—of necessity likewise varied, since the allowances were designed to enable all dealers to meet their competition on equal terms (Fdg. 15, A. 378; A. 87, 97, 103, 149, 154).

This controversy arises out of two price wars.

During the first war, November 1950 through June 1951, Enterprise requested and received allowances (A. 251, 301, PX C, A. 327; DX 12, A. 341). It posted a retail price matching the price of the competing brand stations on the turnpike rather than a price equal to that of the other Texaco dealers in Hartford. Toward the end, however, respondent discovered that petitioner was posting a retail price of 6¢ or 8¢ per gallon higher than the prices of competing brands at neighboring stations (Fdg. 28, A. 380). Almost immediately thereafter, the first price war terminated and respondent discontinued allowances to all dealers, including petitioner (PX C, A. 327).

During the second price war, which broke out in October 1951 and lasted until February 1952, Enterprise did not request any allowances and received none (Fdg. 29, A. 380; A. 47-48, 128, 152, 209). Taking advantage of its uniquely favorable location—as the trial court aptly noted (A. 373-74)—, the station continued to post its normal retail price of about 7¢ or 8¢ above the wholesale price (A. 47, 210-11, 302).

This was Enterprise's own decision as to the best way to maximize its profits. Other Texaco dealers, not enjoying the advantages of petitioner's peculiar location, required, requested and received aid.

On these facts the District Court granted judgment for petitioner, awarding recovery of damages measured by the differences in price to Enterprise and the nine supposedly competing Texaco stations.

ARGUMENT.

(1) There Was No Proof That Respondent Violated The Robinson-Patman Act.

The Robinson-Patman Act condemns only those price discriminations which have certain anti-competitive consequences. The effect must be either substantially to lessen competition, tend to create a monopoly, or injure competition among sellers, buyers or their customers. Petitioner made no effort to prove a substantial lessening of competition or tendency to monopoly in the gasoline market. It rested its case solely on the claim that respondent's pricing policy injured petitioner's competition at the retail level.

Of course, a price difference cannot have any effect upon competition among the seller's customers unless those

customers compete with one another.[2] The District Court recognized that it was incumbent upon petitioner to show that it was in substantial competition with purchasers who received a lower price (A. 372). Purporting to apply this rule of law, the court found that 9 of the 15 named Texaco dealers were in competition with Enterprise and that 6 were not (A. 372-73; Fdg. 35, A. 382). In so finding, the court relied exclusively on its examination of an ordinary street map and certain purely hypothetical testimony of alleged commuter traffic (A. 373).

Manifestly, a map cannot prove either the existence or non-existence of competition. As for commuter traffic, the record will be searched in vain for a scintilla of evidence that a single commuter actually passed both the Enterprise station and that of another Texaco dealer on his way to work. Petitioner's president, Raymond, could not identify a solitary customer who fell into the commuter category, admitting: "I don't know where people are coming from and where they are going" (A. 40). The character of the hypothetical testimony on which the trial court relied is exemplified by the following type of question which petitioner's counsel would put to a witness: "If a person lived in a given town and if he worked at a given place and if he travelled on a given route, would he not pass Enterprise and another Texaco dealer?" (see, e. g., A. 307). An affirmative answer to this hypothetical inquiry—unsupported by any evidence to sustain its underlying factual

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[2] *F. T. C.* v. *Morton Salt Co.*, 334 U. S. 37, 45 (1948); *Balian Ice Cream Co.* v. *Arden Farms Co.*, 231 F. 2d 356 (9th Cir. 1955), cert. denied 350 U. S. 991 (1956); *American Can Co.* v. *Russellville Canning Co.*, 191 F. 2d 38, 56 (8th Cir. 1951); *American Can Co.* v. *Bruce's Juices, Inc.*, 187 F. 2d 919, 924 (5th Cir. 1951), cert. dismissed 342 U. S. 875 (1951); *Chicago Sugar Co.* v. *American Sugar Refining Co.*, 176 F. 2d 1, 10 (7th Cir. 1949), cert. denied 338 U. S. 948 (1950).

premises—provides no competent basis for the finding that a substantial portion of Enterprise's business was with commuter traffic.

An even greater infirmity inheres in this finding. There is absolutely no rational connection between the hypothetical testimony and the court's differentiation of competitive and non-competitive Texaco stations.

The court found that 3 stations *were* in competition with Enterprise despite the fact that there was not even a hypothetical showing of any commuter traffic between them.[3]

The court found that 3 stations *were not* in competition with Enterprise despite the fact that there was a hypothetical showing of commuter traffic in their cases.[4]

Since there is patently no rational basis on which the court grounded its finding of competition, the finding cannot stand. That being so, the conclusion that respondent's price differences injured competition in violation of the Robinson-Patman Act must also fall.

(2) Respondent Established A Complete Defense To This Action By Showing That Its Prices Were Set In Good Faith To Meet Competition.

The dealer assistance program which respondent initiated sprang from the necessity of meeting competition. The trial court did not gainsay that respondent acted in complete good faith in granting price allowances to needy dealers. The allowances were given to meet and not to beat competition. They were available to all dealers who desired

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[3] C. V. DeWolfe, Lamphier Motors and Martin Bros. (Fdg. 35, A. 382).

[4] Adrien DuBois (Durkee), 20th Century Service Station and Tony's Service Station (A. 372-73, 308, 309-10).

to use them for the purpose for which they were given. In rejecting this defense, the court simply held that the good faith proviso of Section 2(b) of the Robinson-Patman Act is applicable exclusively to price reductions intended to meet competition at the seller's level and that the statute does not condone allowances given to retailers to enable them to meet competition at their level (A. 371-72).

This Court has taken cognizance of the fact that "precision of expression is not an outstanding characteristic of the Robinson-Patman Act". *Automatic Canteen Co.* v. *F. T. C.*, 346 U. S. 61, 65 (1953). Because of "the infelicitous language" of the legislation (*id.* at 78), the courts have been compelled to supply its manifest linguistic deficiencies by a construction designed to achieve the evident statutory purpose. E.g., *Standard Oil Co.* v. *F. T. C.*, 340 U. S. 231 (1951); *Elizabeth Arden, Inc.* v. *F. T. C.*, 156 F. 2d 132 (2d Cir. 1946), cert. denied 331 U. S. 806 (1947).

We argued below that the wording and legislative history of the statute reveal a Congressional purpose to forbid discrimination having anti-competitive effects at either the seller or buyer levels; that it was unthinkable that the Section 2 (b) defense was intended to be anything but correlative with the offense; that just as a price discrimination may be unlawful because it injures competition in the buyer's line of commerce, so, too, competition may be met at the buyer level; and that if the occasion for meeting competition exists, the validity of the defense should not depend on the hierarchy in the scheme of distribution at which competition is met.

We urged that the Court of Appeals not place its stamp of approval on the trial court's erroneous reading of the statute. But the Court of Appeals declined to rule on the point in view of its disposition of the damage issue. Logically, however, the question of damages is not reached unless

it is first determined that the Act has been violated. Absent proof of violation, the complaint must be dismissed.

(3) The Asserted Conflict Among The Federal Courts As To The Applicable Rule of Damages Does Not Exist.

It is hornbook law that a private suitor seeking treble damages for an alleged antitrust violation must prove that he was injured in his business or property as a proximate result of the claimed infraction.[5] It is equally clear that even after the fact of injury is shown, the plaintiff must submit relevant data from which a "just and reasonable estimate" of the quantum of his damages may be made. *Bigelow* v. *R. K. O. Radio Pictures*, 327 U. S. 251, 264 (1946).

Petitioner made no effort to comply with either of these requirements. It offered no evidence that it had in fact been injured as a result of the challenged price differentials.[6] It furnished no rational basis for computing the

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[5] 15 U. S. C. §15; *Hudson Sales Corp.* v. *Waldrip*, 211 F. 2d 268, 274 (5th Cir. 1954), cert. denied 348 U. S. 821 (1954); *Nelson Radio & Supply Co.* v. *Motorola*, 200 F. 2d 911 (5th Cir. 1952), cert. denied 345 U. S. 925 (1953); *Wolfe* v. *National Lead Company*, 225 F. 2d 427 (9th Cir. 1955), cert. denied 350 U. S. 915 (1955); *Tepler* v. *Frick*, 204 F. 2d 506, 507 (2d Cir. 1953); *American Can Co.* v. *Russellville Canning Co.*, 191 F. 2d 38, 54 (8th Cir. 1951); *Shotkin* v. *General Electric Co.*, 171 F. 2d 236, 238-39 (10th Cir. 1948); *Myers* v. *Shell Oil Co.*, 96 F. Supp. 670, 674 (S. D. Cal. 1951); *Turner Glass Corporation* v. *Hartford-Empire Co.*, 173 F. 2d 49 (7th Cir. 1949), cert. denied 338 U. S. 830 (1949).

[6] During the first price war (November 1950 to June 1951), when petitioner received allowances along with the other Texaco dealers, petitioner's sales actually exceeded those for the comparable preceding period by a considerable margin (Fdg. 32, A. 381). The fact that damages were nevertheless awarded for this period, when petitioner did not sustain any damage, underscores the trial court's erroneous conception of injury.

With respect to the second price war (October 1951 to February 1952), petitioner asserts that "during June, 1951 to June, 1952, the sales of Enterprise showed a consistent drop in volume while

measure of any damages it may have suffered. Instead, petitioner took the position that mere proof of the price differences automatically established injury and the measure of its damages. The trial court accepted this view of the law and entered judgment accordingly. It was on this ground that the Court of Appeals reversed and dismissed the complaint.

Petitioner now asserts that the determination of the Court of Appeals conflicts with the decisions of this Court and other circuits. The fancied conflict simply does not exist. Rather it is petitioner who is endeavoring to obtain

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other Texaco stations competing with Enterprise showed a corresponding increase in volume" (Petition, p. 8). The record does not support this sweeping assertion. It does show that in each of the months January through May 1952, petitioner's gallonage declined over the comparable period of 1951, while in each of the same months the gallonage of one of its alleged competitors increased over the 1951 figures. But this comparison proves absolutely nothing because in only the first 2 of the 5 months involved, January and February of 1952, were the other Texaco stations getting an allowance. The price war ended in February, and in the 3 succeeding months no allowances were given anywhere in the Hartford area (Fdg. 29, A. 380; PX D, A. 327; A. 128-29, 168). It is evident, therefore, that the decline in Enterprise gallonage over the first 5 months in 1952, and the concurrent increase of its alleged competitor's gallonage, was wholly unrelated to and independent of Texas' pricing policy. For when neither station received any assistance (March through May 1952) Enterprise's sales fell 53,000 gallons while the alleged competing outlet's rose 11,000 gallons. Significantly, the trial court made no finding of any causal relationship between the price differences and petitioner's drop in gallonage.

Equally without substance is petitioner's contention that "Enterprise lost regular customers who told Raymond that they were buying gas at other Texaco stations because they could buy it for lower prices" (p. 7). Raymond did not name one such customer. He did not estimate their number or the gallonage attributable to them. He did not suggest to which other dealer they supposedly went. Indeed, he expressly disclaimed any such knowledge when he testified: "I don't know where people are coming from or where they are going" (A. 40). Raymond's wholly unsupported generalized assertions cannot have any probative significance, and the District Court did not accord them any.

judicial acceptance of an arbitrary rule of damages which is at war with fundamental antitrust doctrine in private litigation.

The essence of the ruling below is that petitioner had to prove that it had been damaged as a result of the fact that some 9 other Texaco stations purchased gasoline at slightly lower net prices (after deducting the variable allowances). Because of petitioner's peculiarly advantageous position as the lead station southbound on the turnpike—a position which enabled it to exact substantially higher prices from its customers than those obtainable by the competing brand dealers in the immediate vicinity—the Court of Appeals questioned whether petitioner had sustained any damage at all (Appendix to Petition, p. 15). If petitioner did lose any commuter business, it would be reasonable to suppose that it would have been diverted to these neighboring turnpike stations rather than to the 9 remote Texaco outlets which were scattered throughout the City of Hartford. Against this factual background, the Court of Appeals held that it was petitioner's burden to establish what profits, if any, had been diverted to the other 9 allegedly competitive Texaco dealers.

In refusing to hold that injury was *ipso facto* shown because petitioner did not purchase at a lower price and that this putative injury was automatically measured by the amount of the price differences, the Court of Appeals followed the rationale of this Court's unanimous decision in *I. C. C.* v. *United States*, 289 U. S. 385 (1933).

That case arose under the Interstate Commerce Act, which makes it unlawful for a carrier to charge rates, though otherwise reasonable, discriminating between competing shippers, and allows recovery of damages occasioned by the unlawful rates. The complainant, a shipper of lumber, was charged more than his competitors. The Com-

mission ordered the discriminatory rate discontinued, but refused to award damages. On appeal the complainant contended that it was entitled to damages as of right on the theory that its profits would have increased by the amount of the discrimination had it been able to ship at the lower rate—parallelling the claim made by petitioner here. Mr. Justice Cardozo, writing for the Court, categorically rejected this contention, stating:

> "When discrimination and that alone is the gist of the offense, the difference between one rate and another is not the measure of the damages suffered by the shipper" (p. 389).

The Court continued:

> "The question is not how much better off the complainant would be today if it had paid a lower rate. The question is how much worse off it is because others have paid less" (p. 390).

The Court went on to analyze the nature of the actionable harm flowing from discrimination as follows:

> "If by reason of the discrimination, the preferred producers have been able to divert business that would otherwise have gone to the disfavored shipper, damage has resulted to the extent of the diverted profits. If the effect of the discrimination has been to force the shipper to sell at a lowered market price, . . . damage has resulted to the extent of the reduction. But none of these consequences is a necessary inference from discrimination without more" (pp. 390-91).

In the present case there was no showing of any diversion of business from petitioner to the preferred dealers. Nor was there any evidence that the discrimination forced petitioner to sell at a lowered market price. On the con-

trary, petitioner maintained the highest price in the area and made its customary margin of profit, thus passing on to the motorist the price differential. Cf. *Wolfe* v. *National Lead Company*, 225 F. 2d 427 (9th Cir. 1955), cert. denied 350 U. S. 915 (1955).

Congress itself fully considered and explicitly repudiated the theory of automatic damages adopted by the District Court.

The Robinson-Patman Bill, as it originally passed the Senate, provided:

> "For purposes of suit under Section 4 of this Act, the measure of damages for any violation of this section shall, where the fact of damage is shown, and in the absence of proof of greater damage, be presumed to be the pecuniary amount or equivalent of the prohibited discrimination. . . ." [S. 3154, 74th Cong., 2d Sess. 8 (1936)].

This provision did not survive the Conference Committee. In explaining the deletion, the House Conference Report said:

> "Subsection (e) of the Senate Bill set up a *new measure of damages* for violations of the law, whereas the House bill left the damages to be determined *in accordance with the provisions of the existing Clayton Act.* The Senate receded." [H. R. Rep. No. 2951, 74th Cong., 2d Sess. 8 (1936)] (emphasis supplied.)

Significantly, the Interstate Commerce Act had a parallel history. Reviewing that history in *Pennsylvania R. Co.* v. *International Coal Mining Co.*, 230 U. S. 184, 198 (1913), this Court concluded that the legislative record there, as here, is "conclusive against the contention of the plaintiff."

Petitioner wholly ignores the precedential force of the *I. C. C.* case and the unequivocal legislative record. Instead, it places primary reliance on a stray dictum by Mr. Justice Jackson in *Bruce's Juices* v. *American Can Co.*, 330 U. S. 743 (1947). *Bruce's Juices* was not even a Robinson-Patman Act case. It was an action for goods sold and delivered. The statement of Mr. Justice Jackson was wholly unnecessary to the decision, and a perusal of the briefs in that case shows that the point was not argued to the Court, and that neither the *I. C. C.* decision nor the legislative history of the Robinson-Patman Act was called to the Court's attention. Moreover, as Judge Learned Hand pointed out below, the case at bar is distinguishable from *Bruce's Juices* on its facts (Appendix to Petition, pp. 16-17).

Even were it to be assumed *arguendo* that the price differences might be the measure of damages in some other discrimination case, such a rule is singularly inappropriate here. This is graphically illustrated by the fact that the District Court awarded damages based on the amount of the differential on *all* gallonage purchased by petitioner, even though 80% or 90% of its business was derived from the through traffic which was admittedly non-competitive with the other Texaco stations. What is more, there is no earthly reason to suppose that some or all of the residual 10% or 20% of petitioner's customers were diverted to other distant Texaco stations rather than to the 7 competing brand outlets which adjoined the Enterprise location and which sold their gasoline at prices substantially lower than those charged by Enterprise.

The ruling below is entirely consonant with the earlier decision of the same Court of Appeals in *Sun Cosmetic Shoppe* v. *Elizabeth Arden Sales Corp.*, 178 F. 2d 150, 153 (2d Cir. 1949). As a reason for granting certiorari, peti-

tioner claims that the position of the Second Circuit conflicts with that of the Eighth. It is true that in *Elizabeth Arden Sales Corp.* v. *Gus Blass Co.*, 150 F. 2d 988 (8th Cir. 1945), cert. denied 326 U. S. 773 (1945), the Eighth Circuit espoused a contrary view. But the court abandoned that view in *American Can Co.* v. *Russellville Canning Co.*, 191 F. 2d 38 (8th Cir. 1951), and quoted with approval the Second Circuit's language in *Sun Cosmetic* to the effect that "the only proper proof of damages is the loss to the plaintiff's business" (191 F. 2d at 56).

The award of damages in *Bruce's Juices* v. *American Can Co.*, 87 F. Supp. 985 (S. D. Fla. 1949), aff'd 187 F. 2d 919 (5th Cir. 1951), cert. dismissed 342 U. S. 875 (1951), was not bottomed on the amount of the price discrimination. The court found as a fact that the discrimination had caused a loss of sales, prevented expansion and impaired good will, and permitted recovery to compensate for the aggregate of these proven injuries.

Petitioner also misconstrues the import of *American Cooperative Serum Ass'n.* v. *Anchor Serum Co.*, 153 F. 2d 907 (7th Cir. 1946), cert. denied 329 U. S. 721 (1946). The Seventh Circuit did not uphold a recovery based on the differences in the prices to the plaintiff and the favored buyer. Recovery was based upon loss of profits occasioned by the fact that the plaintiff was compelled to reduce its selling price in order to compete with the favored buyer. The case, therefore, is merely an application of this Court's ruling in *I. C. C.* that "[i]f the effect of the discrimination has been to force the shipper to sell at a lowered market price, damage has resulted to the extent of the reduction" (289 U. S. at 291).

As for *Reid* v. *Doubleday and Company*, 136 F. Supp. 337 (N. D. Ohio 1955), the case is utterly irrelevant. The court merely denied a motion by the defendant to preclude the

plaintiff from proving damages in the nature of lost profits.

In short, there is no substance to petitioner's argument that the decision below is a departure from the rule prevailing in other circuits. On the contrary, the decision is faithful to the cardinal requirements that a plaintiff in a private antitrust action must furnish some proof that he sustained an injury to his business as a result of the defendant's violation, as well as a rational basis for determining the amount, if any, of his damages.

There is nothing unworkable about such a rule. It has worked time and again, as is evidenced by the spate of lawsuits in which plaintiffs have successfully recovered treble damages under Section 4 of the Clayton Act. What petitioner is advocating is a rule which would permit recovery even where no injury has been sustained. If petitioner's view won judicial acceptance, mere proof of price differences without more would automatically result in liability for threefold the differential without regard to whether any damage had in fact been inflicted. Congress has stated in plain and unmistakable terms that it never intended to impose such a drastic penalty. There is absolutely no warrant for urging this Court to engage in a piece of judicial legislation in the face of so convincing a demonstration of contrary legislative intent.

Petitioner argues in passing that even if the rule of damages enunciated by the court below is correct, the complaint should not be dismissed until petitioner has been accorded an opportunity to endeavor to present evidence in compliance with the applicable law. But as the Court of Appeals properly pointed out, "All the evidence was so fully developed that there is no reason for another trial" (Appendix to Petition, p. 18). The record makes it abundantly clear that a remand on the issue of damages would be a futile gesture.

Conclusion.

The Court of Appeals correctly held that petitioner had adduced no evidence tending to establish an indispensable element of its case, namely, that it had been damaged as a result of respondent's alleged violation of the Robinson-Patman Act and the amount, if any, of such damage. Had the court found it necessary to reach the issues of violation and justification, it would have been obliged to reverse on those grounds as well.

The case does not conflict with any decision of this Court or any Court of Appeals. Nor does the petition raise any important question of federal law warranting review.

Respondent, therefore, respectfully urges that the petition be denied.

Respectfully submitted,

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